

STATE OF MICHIGAN
COURT OF APPEALS

RUDY G. CLARY,

Plaintiff-Appellee,

v

VIVIAN G. CLARY,

Defendant-Appellant.

UNPUBLISHED

August 16, 2005

No. 254259

Kent Circuit Court

LC No. 02-006276-DO

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Vivian Clary appeals as of right from a judgment of divorce entered after a bench trial. The only issue on appeal is the 70 percent to 30 percent division of the marital property in favor of plaintiff Rudy Clary. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

The parties were married for forty-five years, but stopped living together in the mid-1980's after marriage counseling failed to help them stop fighting with each other. Rudy Clary testified that when they decided to separate, they sold their house for "next to nothing" in the face of a pending foreclosure. At the time of trial, Rudy Clary was sixty-six years old and Vivian Clary was sixty-five. The parties' four children are now all self-sufficient adults. Both parties have a variety of health problems.

Rudy Clary had a year of college education and eventually graduated from a management training institute. He then worked at various jobs until he found steady employment from 1990 through 2002. His starting salary was around \$44,000 in 1990, but jumped to \$87,000 when he was promoted to director of operations in 2000. However, Rudy Clary's job was eliminated in 2002, forcing him into unemployment. Before this salary increase and through the first part of the separation, Rudy Clary testified that he helped Vivian Clary every month "as she needed it" and as he was able to afford it. Rudy Clary indicated that after he received the raise, he paid all Vivian Clary's expenses except food.

Neither party disputes that they had no significant assets or property at the time of the separation. However, from 1987 through 2002, Rudy Clary acquired two parcels of real property and a 401(k) plan that Vivian Clary now argues the trial court improperly divided at seventy

percent to Rudy Clary and thirty percent to Vivian Clary. Vivian Clary admitted that she did not contribute in any way to the acquisition of these assets.

Vivian Clary testified that she did not work during most of the marriage before the parties separated, but she returned to college in the 1980's and eventually earned enough credit hours to take an examination to become an accountant. However, Vivian Clary explained that her various health problems limited her ability to work, so during the time the parties were separated, she mostly worked part-time jobs and/or collected social security checks for her various afflictions. Vivian Clary also testified that her health deteriorated in 1988 and she was not able to return to work until 1997. In 2000, Vivian Clary got a ten-dollar-an-hour job as a records keeper for a business that closed in the early part of 2003.

On December 31, 2003, the trial court issued its opinion, applying the property division factors in *Sparks v Sparks*¹ as follows:

The first factor is the duration of the marriage. As aforesaid these parties were married forty-five (45) years with at least the last fifteen (15), possibly the last twenty (20), in near total separation. As the assets in question were all earned after Defendant acted as realtor in the sale of the marital home in 1983, this factor is given little weight.

The second factor is the contribution of the parties to the marital estate The parties agreed in their trial testimony that Defendant paid no money whatsoever to the acquisition, improvement, or accumulation of either real property. Defendant contributed nothing to Plaintiff's 401k.

Defendant contends that her living in "poverty," not filing for divorce in the 80's, and her occasional cleaning and cooking up to 1988 allowed Plaintiff to both purchase and pay on these real properties. His 401k was also earned through Defendant's voluntary restraint in remaining legally married without filing for divorce.

In this case, this Court is convinced that this factor favors the Plaintiff. *Byington v Byington*,^[2] at 115 commands that this factor ". . . will generally take on increasing significance with regard to property acquired after such manifestation" (of intent to lead separate lives). Indeed, *Byington* goes on to say that after such a public manifestation this contribution factor will be a particularly significant fact. With separation for at least fifteen (15) years and little to no statutory contribution from Defendant, Plaintiff earned these assets himself. Defendant's argument of contribution are [sic] de minimis at best.

¹ *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).

² *Byington v Byington*, 224 Mich App 103; 568 NW2d 141 (1997).

The third factor is age of the parties. At [the] time of trial, Plaintiff was sixty-six (66) and Defendant was sixty-five (65). This factor favors neither party.

The fourth factor is the health of the parties. Neither party is totally physically healthy. . . . As Defendant's health problems are myriad and long standing, this factor favors her.

The fifth factor is life status of the parties. Neither party testified specifically on this factor. Plaintiff paid his bills and gave Defendant varying sums of money for support. Defendant worked part-time where she could and lived on her SSI and money Plaintiff gave her. This factor is neutral to the parties.

The sixth factor is necessities and circumstances of the parties. This factor is detailed in other factors herein.

The seventh factor is earning abilities of the parties. . . . In the last year prior to trial (2002) Plaintiff earned \$87,941 plus \$11,368 in social security; the Defendant earned \$11,694. Plaintiff lost his job . . . as did Defendant-[sic] both due to their respective employers economic circumstances and downsizing. Plaintiff's income is \$700 per month rental income; G.M. Pension of \$138.27 per month and social security of \$1,486 per month. It was unclear at time of trial if Plaintiff would be able to continue to draw Unemployment after July 2003. Prior to July 2003 it was \$1,240 per month. Defendant's income is \$662 social security and whatever part-time work she may be able to procure. The income disparity favors defendant.

The eighth factor is past relations and conduct of the parties. It is difficult at best after fifteen (15) to twenty (20) years of separation to determine who is at fault. Both parties blame the other. Plaintiff testified and Defendant concurred that the parties tried counseling approximately seven (7) different times prior to 1988. This factor is neutral to the parties.

The last factor is general principles of equity. Neither party chose to change their legal status until the 2002-divorce filing. As this was the choice of both, general principles of equity evenly weigh in this case.

Following *Byington v Byington*, at 116 this Court balances Plaintiff's overwhelming contribution to the marital estate with Defendant's unquestionable health needs and awards to Plaintiff seventy (70%) percent and Defendant thirty (30%) percent of the real property and the 401k. The specific dollar amounts will be detailed later in the opinion.

The trial court ordered Rudy Clary to pay Vivian Clary \$833 per month in spousal support until her death, remarriage, or cohabitation with an unrelated male. It also awarded as spousal support, a lump sum of \$6,985, which represents half of the consulting fees Rudy Clary had received in January 2004. Further, the trial court awarded Rudy Clary the two parcels of real property but gave Vivian Clary a lien in the amount of thirty percent of the equity in each parcel. The trial court also awarded Vivian Clary thirty percent of the value of the 401(k) plan.

II. Evaluating The Judgment

A. Standards Of Review

In reviewing a marital property distribution, we must first review the trial court's findings of fact.³ We will not reverse the trial court's factual findings unless they are clearly erroneous.⁴ If we uphold the factual findings, we must then decide whether the dispositive ruling was fair and equitable in light of those facts.⁵ The dispositional rulings in divorce judgments are discretionary, and we will affirm them unless we are left with the firm conviction that the division was inequitable.⁶

B. Legal Standards

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances.⁷ The division need not be mathematically equal, but any significant departure from congruence must be clearly explained.⁸ To reach an equitable division, the trial court should consider the duration of the marriage; the contribution of each party to the marital estate; each party's station in life; each party's earning ability; each party's age; health and needs; fault or past misconduct; and any other equitable circumstance.⁹

C. Duration Of The Marriage

Vivian Clary first argues that the trial court erred in determining that the duration of the marriage factor should be given little weight. In support of this argument, Vivian Clary points out that even before the parties' separation, they were together for at least thirty years, during which, Vivian Clary argues, she maintained the home and family so that Rudy Clary could concentrate on earning money.

Despite a nearly fifty-year marriage in this case, we find that the trial court did not err by not attributing a great deal of weight to the length of the marriage. The overriding factor in the trial court's decision not to do so was the lengthy separation that occurred between the parties beginning in the early to mid-1980's. Vivian Clary claims that she is less marketable for a job now because she was married for so long and relied on Rudy Clary even during the separation. However, as Rudy Clary correctly points out, Vivian Clary actually benefits from the fact that

³ *Sparks, supra* at 151.

⁴ *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

⁵ *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002).

⁶ *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

⁷ *McNamara, supra* at 188; *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997).

⁸ *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003).

⁹ *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks, supra* at 159-160.

the marriage continued through a lengthy separation because if the parties had divorced shortly after the separation, Vivian Clary would not be entitled to *any* of the property Rudy Clary acquired after 1990.

D. The Parties' Contributions To The Marital Estate

Next, Vivian Clary argues that the trial court erred in calculating the parties' contributions to the marital estate. Generally, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate, and the appreciation of a premarital asset during the marriage is subject to division as part of the marital estate unless the appreciation was wholly passive.¹⁰ The parties' manifestation of intent to lead separate lives, such as by filing a complaint for divorce or *maintaining separate homes*, may be of crucial significance when apportioning the marital estate.¹¹ As the *Byington* Court explained:

As a practical matter, we believe that the factor of the "contribution of each party to the marital estate" will generally take on increasing significance with regard to property acquired after such a manifestation. Generally, a court can expect to find a significantly lesser contribution by the nonacquiring spouse with respect to property acquired after public manifestation of an intent to lead separate lives than with respect to property acquired before such a manifestation. Accordingly, in considering the *Sparks* factors with regard to property acquired after such a manifestation, we believe that courts will normally find the contribution factor to be a particularly significant factor. Whatever presumption of congruence exists with respect to the distribution of marital assets, attenuated after the parties have publicly manifested their intent to lead separate lives. In particular, we recognize the possibility that appropriate weighing of the *Sparks* factors *may in some cases result in a determination that the nonacquiring party is entitled to no portion of property acquired after a manifestation of intent to lead separate lives because of the difference in the parties' contributions to acquisition of such property*. However, we also recognize that consideration of other *Sparks* factors may in other cases require some apportionment of such property up to and including an equal apportionment.^[12]

Vivian Clary argues that the present case is distinguishable from *Byington* because the parties in *Byington* were negotiating their divorce when separated, while by contrast, she and Rudy Clary were separated but still married, and neither party seemed ready to actually get divorced. We find this distinction tenuous at best. In fact, it is difficult to fathom a more sustained and permanent manifestation of the parties' desire to lead separate lives than the parties' long separation and pursuit of separate lives after their separation. Accordingly, we reject this argument.

¹⁰ See *McNamara*, *supra* at 183-184.

¹¹ See *Byington*, *supra* at 112; emphasis added.

¹² *Id.* at 115; citations omitted; emphasis added.

E. The Parties' Income-Earning Capacity

Vivian Clary next argues that, although the trial court ruled in her favor on this factor, it did not weigh the income earning capacity factor strongly enough in her favor. Vivian Clary argues that Rudy Clary's skills and education give him a greater earning potential. However, the record indicates that both parties are relatively old, both have ongoing health problems, both are drawing social security benefits, and Rudy Clary is drawing unemployment. Despite these facts, Vivian Clary argues that Rudy Clary is all but on the cusp of returning to a position that pays \$87,000 per year, the amount he made in the year before he was laid off; but nothing in the record supports that assertion. Thus, although Rudy Clary unquestionably earned a greater salary in his final year of employment, the parties' work skills are not so disparate that we can conclude that the trial court erred in not weighing the earning capacity factor more strongly in Vivian Clary's favor.

F. The Parties' Past Relations

Vivian Clary next argues that the trial court erred in ruling that past relations factor should be neutral. Determination of the relative fault of the parties to a divorce, and an assessment of the impact that fault had on the breakdown of the marriage, are subject to the trial court's discretion.¹³ The trial court is in the best position to determine the extent to which each party contributed to the breakdown of the marriage.¹⁴ Both parties testified that they tried on several occasions to right the wrongs in their marriage by attending counseling, but they were simply unable to stop fighting on a regular basis. Rudy Clary admits that he assaulted Vivian Clary on three separate occasions, and also testified that Vivian Clary once threatened him with a knife. We conclude that the trial court did not err in assessing this factor.

G. General Principles Of Equity

Finally, Vivian Clary argues the general principles of equity factor should result in a large distribution of marital property to her because Rudy Clary was "leading her on" when he made her believe that their marriage was "for life." The trial court chose to weigh this factor evenly because although Vivian Clary claims to have been blindsided by the divorce papers, she could have divorced Rudy Clary at any time during the twenty-year separation and moved on with her life. We find no error in the trial court's conclusion.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

¹³ *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995).

¹⁴ *Id.*